

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

(San Leandro, California)

UNITED RENTALS INC.

Employer¹

and

Case 32-RC-5078

LABORERS' LOCAL UNION 886,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO

Petitioner²

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer, a Connecticut corporation, is engaged in the retail and non-retail rental of equipment at its San Leandro, California facility,

¹ The name of the Employer appears as stated at the hearing.

² The name of the Petitioner appears as stated at the hearing.

and that during the past 12 months it has purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of California. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. Accordingly, the assertion of jurisdiction is appropriate herein.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Petitioner seeks to represent a unit consisting of three mechanics, five yard employees and three drivers, excluding all other employees, guards, and supervisors as defined in the Act. The Employer, however, argues that the Union's proposed unit is inappropriate, and that the "only" appropriate unit would be an overall unit consisting of all eighteen employees at its San Leandro facility, excluding the branch manager. Specifically, the Employer seeks to include a shop foreman, four counter employees, a parts associate/manager, and a branch associate/office administrator. For the reasons set forth below, I find that the petitioned-for unit, including the shop foreman, is an appropriate unit.

The Employer's San Leandro facility employs 19 persons including the branch manager Dale Ferdinandi who oversees the operation and is responsible for hiring, evaluating, disciplining and firing all employees at the facility. In addition, Ferdinandi determines and makes the schedule for all employees.

³ Briefs filed by the parties have been duly considered.

The Employer employs three truck drivers at its San Leandro facility. Two are tractor-trailer drivers with Class A licenses and one is a tractor-trailer driver with a Class B license. All three operate and transport equipment to customer locations, lift equipment onto trailers and operate equipment at customer sites and in the yard, critique customers' ability to use equipment in a safe manner, suggest equipment and supplies to meet customers' other needs, adhere to all safety requirements including Federal Motor Carrier Safety Regulations, and are familiar with shipping documents and hazardous materials. The two Class A drivers earn about \$17 per hour. The Class B driver earns about \$15 per hour. The truck drivers do not have access to the Employer's computer system and do not work at the counter.

The Employer employs five yard employees whose primary role is to provide labor assistance. As such they perform a variety of manual tasks in the rental yard such as loading and unloading equipment, assisting with deliveries, preparing equipment for rental, checking equipment upon return for damage, hours used, mileage and fuel levels to determine proper customer billing, inspecting equipment and delivery trucks, cleaning equipment and the work area, performing minor repairs on small equipment and communicating with the mechanics to troubleshoot more complex problems. The yard employees may make deliveries using the Employer's pickup trucks but they do not drive big rig vehicles. Joe DeSoto is the lead yard person and is responsible for overseeing the work of the four other yard employees. DeSoto coordinates the work of the yard employees by watching their work and giving them instructions on where to work and what to do. Also, DeSoto has access to the Employer's computer system and performs computer transactions at the counter on occasion. Only one other yard employee, Riasat Ali, has an access code to the Employer's computer system but there are no specific examples in the record of Ali actually using the computer or performing counter work. DeSoto

earns about \$13.50 per hour while the four other yard employees earn between \$11 and \$11.50 per hour.

The Employer employs three mechanics. There are three levels of mechanics. Two of them are classified as mechanic II and earn about \$16.50 per hour. The third is classified as a mechanic III and earns about \$15 per hour. The mechanic II classification is more advanced than the mechanic III who works more as an assistant to the mechanics. In general, the mechanics maintain and repair a variety of construction equipment and tools for rental or purchase. Their duties include rebuilding gas and diesel engines, and repairing electrical and air conditioning equipment, heaters, starters, generators, hydraulic cylinders, hoists, lifts, automotive tools, air compressor diaphragms, vacuum equipment and spot welders. Mechanics also order parts as necessary and track the time spent on equipment repairs. Mechanics generally work in the shop but are also called upon to service rental equipment in the field. In addition, mechanics occasionally make deliveries with the Employer's two pickup trucks.

Barry Sweat is the Employer's shop foreman and service manager. As such Sweat works as a mechanic and "supervises" the work of other mechanics. Sweat inspects equipment and ensures that equipment is operable and ready for rental, diagnoses, schedules and performs repairs and maintenance, creates work schedules, keeps production and employee records, monitors employees, ensures that work is done correctly and on time, organizes employees' activities, delegates tasks, enforces safety procedures and trains new employees. Sweat earns about \$22 per hour.

There are four sales coordinators, also referred to as counter employees. Counter employees earn between \$16 and \$17.50 per hour. Counter employees greet customers, ascertain what equipment the customers need, prepare rental agreements, and complete rental

agreements upon return of the equipment. In addition, counter employees show customers how to use equipment, help customers load and unload equipment, ensure that all contracts are accurate using the Employer's computer system, coordinate and track daily equipment pickups and returns, run reports, ensure that the showroom is clean, presentable, sufficiently stocked and that the inventory is priced correctly, and assist in training counter personnel. Counter employees occasionally make deliveries with the Employer's two pickup trucks and one counter employee who previously worked as a mechanic may on occasion perform mechanical work, although no specific examples of this interchange were provided. Also, counter employee Ernie Lopez, who used to be a Class A driver for the Employer two or three years ago, has, on at least one occasion in the last year, operated a big rig or trailer truck to deliver a piece of heavy equipment.

Saiyad Ahmed functions as the senior sales coordinator/counter person and dispatcher. As the senior counter person, Ahmed is responsible for overseeing the branch rental operation and counter sales personnel. His duties mirror the duties of the counter employees. In addition, Ahmed has primary responsibility for customer relations, showroom displays, equipment presentation, and inside sales and rentals of merchandise. As the dispatcher, Ahmed oversees the loading and unloading of all equipment and supplies and is responsible for coordinating the truck drivers' routes. Ahmed assigns a daily route to drivers and maintains radio contact with them during the day. He also calls the drivers throughout the day to advise them of additional stops as needed, i.e. for pickup of equipment in the field. In addition, Ahmed's dispatcher duties require him to perform record keeping on all purchase orders and warranties on trucks, trailers and branch equipment. Ahmed started as a yard employee but as senior sales coordinator he no longer performs yard work.

The Employer employs one parts associate/parts manager, Sheik Ali who earns about \$13.65 per hour. Ali is responsible for maintaining inventory, negotiating pricing contracts and choosing suppliers for branch merchandise, parts and other customer demands. His duties include purchasing inventory from manufacturers or suppliers, obtaining inventory from other locations, processing customer and shop orders for parts, completing invoices and inventory records, closing work orders upon completion, verifying customer credit, shipping parts to customers and providing parts to the service department, maintaining current parts manuals, catalogues, literature and price lists, preparing reports on incoming parts, making returns for slow moving or obsolete inventory, forwarding potential business leads, and assisting the service manager in preparing estimates. Ali orders parts primarily on account and there is no dollar limit on the amount of parts he can order. In addition, Ali works at the counter on Saturdays, during some weekdays and fills in for counter employees when they are absent. Ali started as a yard employee and on occasion performs yard work – he covered for a yard employee who was absent about one month ago. He does not work as a mechanic or driver.

Ruth Wilson functions as branch associate and office administrator and her primary role is to assist the branch manager in carrying out the day-to-day administrative and clerical business functions of the branch such as processing accounts payable and receivable, assisting with payroll and credit and collection issues, making copies, typing, sending faxes and answering telephones. Wilson also performs some duties of a sales representative such as mailing catalogs to customers.

All employees are covered by the same vacation and sick leave policies and all are paid biweekly. Counter employees and the parts associate are the only employees eligible to receive monetary incentives offered by equipment manufacturers, also referred to as “spiffs.” During

the past year, two counter employees each received a spiff and the parts associate received two spiffs, all in the amount of \$100. There are two different profit sharing plans and the formulas for computing the entitlement under each plan, as well as the distribution, are different. The profit sharing plan for the branch manager and the counter employees is based on the annual profitability of the facility and is distributed annually. The profit sharing plan for the remaining employees is based on employee performance and is distributed twice a year.

As noted, the Employer argues that the petitioned-for unit is not an appropriate unit for collective bargaining and, rather, that the “only” appropriate unit must comprise all employees. In deciding the appropriateness of a bargaining unit, the Board first considers the union’s petition and whether the requested unit is appropriate. Overnite Transportation Company, 322 NLRB 723 (1996). The Board, however, does not compel a petitioner to seek any particular appropriate unit. Id. The petitioned-for unit need only be an appropriate unit for purposes of collective bargaining, not the most appropriate unit, and in representation proceedings, the unit sought by the petitioner is always a relevant consideration. Lundy Packing Co., 314 NLRB 1042, 1043 (1994). A union is, therefore, not required to request representation in the most comprehensive or largest unit of employees of an employer. Overnight, *supra* at 723. In arriving at an appropriate unit determination, the Board weighs various community of interest factors, including:

[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs. . .; the infrequency or lack of contact with other employees; lack of integration with other employees; lack of integration with work functions of other employees or interchange with them; and the history of bargaining.

Id. at 724, citing Kalamazoo Paper Box Corporation, 136 NLRB 134 137 (1962). No one of the above factors has controlling weight and there are no *per se* rules to include or exclude any classification of employees in any unit. Airco, Inc., 273 NLRB 348 (1984).

Several factors support a finding that the petitioned-for unit herein is appropriate. The Board has held that a unit consisting of yard employees, mechanics and delivery personnel but excluding counter and customer service personnel is an appropriate unit. See Avis Rent-a-Car System, Inc., 132 NLRB 1136 (1961). The counter employees work behind a counter inside the facility. They take orders from customers for equipment, inform the customers of the types of equipment available, prepare and consummate the necessary rental agreements, and obtain required information from the customers. Although the counter employees may occasionally deliver equipment in the Employer's pickup trucks or assist with minor repairs, their primary duties are distinctly clerical in nature as distinguished from the job functions of mechanics, yard employees and drivers who are engaged in manual labor.

Contrary to the Employer's position and for the reasons set forth above, I find that the unit sought is not arbitrary, heterogeneous or an artificial grouping of employees and, therefore, the Employer's reliance on Moore Business Forms, Inc., 204 NLRB 552 (1973) and Glosser Bros., Inc., 93 NLRB 1343 (1951) is inapposite. Also, J.C. Penny, 328 NLRB 766 (1999), relied upon by the Employer is distinguishable. In that case the telemarketers who the Board ordered to be included in a unit of customer service employees performed similar if not identical clerical and customer service functions. Also, in that case, there was evidence of substantial contact and interchange between the telemarketers and unit employees. In contrast, the employees in the petitioned-for unit here perform manual tasks whereas the counter employees the Employer seeks to include perform clerical tasks. Also, the only evidence of interchange in the instant case

is limited to occasional instances not sufficient to require their inclusion in the petitioned-for unit. See Budget Rent-A-Car of New Orleans, Inc., 220 NLRB 1264 (1975).

The Employer further argues that in Case 32-RC-4754 the Petitioner sought to include all classifications in an election conducted by the Board at the same facility on May 5, 2000 and, therefore, the bargaining history favors a facility-wide unit. I take administrative notice that in Case 32-RC-4754 the parties executed a Stipulated Election Agreement and a Board election was conducted in a unit consisting of “all full-time and regularly scheduled part-time yard employees, truck drivers, and mechanics employed by the Employer at its San Leandro, California facility; excluding all office clerical employees, guards, and supervisor as defined in the Act.” As a result, the Employer’s assertion that the Petitioner sought, and thus, the bargaining history favors a facility-wide unit because the Petitioner had previously agreed to include those employees it presently seeks to exclude, is not accurate.

Accordingly, and for the reasons set forth above, I shall exclude the counter employees, including the senior counter employee, Ahmed, from the unit. I shall also exclude the parts associate⁴ and branch associate/office administrator whose job duties are likewise distinctly clerical in nature and require no manual labor.

With regard to the shop foreman/service manager, Barry Sweat, the Petitioner argues that he should be excluded as a statutory supervisor under Section 2(11) of the Act because he monitors, supervises and assigns work. For the same reasons, the Petitioner asserts that Sweat does not share a community of interest with the other employees and, therefore, should be excluded from the unit on that basis as well. The Employer contends that only plant manager

⁴ Thus, I find it unnecessary to determine whether the parts associate should be excluded as a managerial employee. The Petitioner argues in its brief that the parts associate should be excluded as a managerial employee because of his ability to pledge the Employer’s credit. However, this factor alone is not determinative of managerial status and

Ferdinandi possesses and exercises the primary indicia of a statutory supervisor, and that, while Sweat may provide some oral input regarding the mechanics, this input is based only on his expertise on mechanical work. However, Sweat earns substantially more than other employees at the Employer's facility. Further, the job descriptions for Sweat reveal that he has authority to assign, direct, monitor and "supervise" the work of employees in the petitioned-for unit. However, the record does not reveal whether he actually exercises the authority of assigning, directing, monitoring and supervising unit work using independent judgment. Under these circumstances, I find the record insufficient to establish that Sweat is a statutory supervisor under Section 2(11) of the Act. I shall, therefore, direct that Sweat's vote be cast subject to challenge.

In summary, and based on the foregoing, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time mechanics, yard employees and drivers employed by the Employer at its San Leandro, California facility; excluding all other employees, guards, and supervisors as defined in the Act.

There are approximately 11 employees in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.⁵ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the

there is no evidence that the parts associate formulates, determines or effectuates the Employer's policies. See American Federation of Labor, 120 NLRB 969 (1958).

⁵ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by LABORERS' LOCAL UNION 886, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care 359 Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-

5211, on or before November 22, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by November 29, 2002.

Dated at Oakland, California this 15th day of November 2002.

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